

Saga Food Service of Hawaii, Inc. and International Organization of Masters, Mates & Pilots. Case 37-CA-1806

December 16, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND
MEMBERS FANNING AND HUNTER

On August 30, 1982, Administrative Law Judge David G. Heilbrun issued the attached Decision in this proceeding. Thereafter, the Charging Party filed exceptions and a supporting brief, and Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

DECISION

STATEMENT OF THE CASE

DAVID G. HEILBRUN, Administrative Law Judge: This case was heard at Honolulu, Hawaii, on March 16 and 17, 1982, based on an amended complaint alleging that Saga Food Service of Hawaii, Inc., called Respondent, violated Section 8(a)(1) and (3) of the Act by first suspending and then discharging Karen Sommerstedt, by refusing to hire Bart Kimura, by contemporaneous threats against employees, and by further utterances creating an impression among its employees that their union activities were under surveillance.

Upon the entire record,¹ my observation of witnesses, and consideration of post-hearing briefs, I make the following:

**FINDINGS OF FACT AND RESULTANT CONCLUSION
OF LAW**

Windjammer Cruises of Hawaii, Inc., headed by R. J. Halcro, offers evening party-style sails for tourists out of Honolulu harbor. The ship *Rella Mae* is chiefly involved, and this 282-foot-long vessel was originally licensed to carry 600 passengers. Captain, crew, and service person-

nel had been Windjammer Cruises' employees, with a firm named Royal Banquet being the food contractor and musical entertainment having been provided by Iva Kinimaka.

Based on initiating contact from Halcro in May 1981, Respondent later submitted a proposal for food, beverage, and associated service on the *Rella Mae* over an initial 4-month period to commence September 15, 1981. Upon Halcro's acceptance, Respondent's district manager, Bert Pedersen, designated Food Service Director Dennis Howland with responsibility for the new account. Howland operated out of Honolulu's Mid-Pacific Institute, where its kitchen served not only that private high school but nearby smaller institutions. Such a setup is illustrative of Respondent's management contracting presence in Hawaii, whereby approximately 600 persons are employed throughout 10 accounts with institutions and businesses to provide them with food and related service.² Howland learned preliminarily of this new undertaking on or about September 6. Beginning September 10 he was regularly present on *Rella Mae* cruises, initially to observe and familiarize himself and from September 15 onward as Respondent's official in charge. Catering a ship was new to Respondent's business in Hawaii, and the *Rella Mae* contract comprised an estimated 7-8 percent statewide activities.³

As this sequence of events was passing, the Union had mounted an organizing drive among Windjammer Cruises' employees, and to this end had filed a representation petition docketed as Case 37-RC-2653 on August 10. Hearings were held on September 3 and 18 and October 9, with the matter last known as being before the Regional Director for decision. By letter dated September 24 the R case Hearing Officer had requested numerous organizations to "have a representative present" at the third hearing in order that the rights of all parties might "be fully protected." Respondent was among the several so notified, and counsel appeared for it at the October 9 hearing.⁴ In the course of this final hearing on the petition the Union made certain motions, including one contending that Windjammer Cruises and Respondent were engaged in a "joint enterprise" with relation to food service personnel.

By letter dated September 3 Halcro had individually notified affected employees of the imminent change. His communication read:

² All dates and named months hereafter are in 1981 unless shown otherwise.

³ Respondent maintains an office and place of business in Honolulu, Hawaii, for the catering of food and beverage products, as to which it annually receives gross revenues in excess of \$500,000 while purchasing and receiving goods and supplies valued in excess of \$50,000 directly from suppliers located outside Hawaii. From this I find Respondent to be an employer engaged in commerce within the meaning of Sec. 2(2), (6) and (7) of the Act. Additionally, as Respondent admits to be so, I find that International Organization of Masters, Mates & Pilots, called the Union, is a labor organization within the meaning of Sec. 2(5).

⁴ Respondent's counsel clarified that his client had never formally been made a party in the R case, and that his appearance was a limited one solely because a subpoena called for the production of "certain information."

¹ Certain errors in the transcript have been noted and are hereby corrected.

We wish to inform you that effective September 16, 1981, the entire passenger service operation including janitorial service will be taken over by an independent contractor, Saga Food Services of Hawaii, Inc. Accordingly, your last day of employment with Windjammer Cruises, Inc. will be September 15, 1981.

While we have no authority to speak for Saga Food Services, it is our understanding that their representatives will be reviewing your work performance between now and September 16th for consideration of possible employment with Saga.

We thank you for your efforts on behalf of Windjammer Cruises, Inc.

Most persons applied to Respondent and were hired to continue in their same type of work effective Tuesday, September 15. Hostess Karen Sommerstedt was thus retained; however, Bart Kimura, an accomplished bartender, was not, nor was former Purser and Chief Steward Michelle Kuntz. Each of these individuals had some role in supporting the Union; however, perceptions differ as to extensiveness. Sommerstedt testified that she had made initial contact with Harold Meyer, the Union's field representative in Hawaii, and that she maintained frequent contact with him throughout August and September. It seemed to her that about 98 percent of all employees contemplated by the Union's petition showed support by attending informational meetings, but only three (not including Kimura) were involved in "actual[ly] organizing" by passing out authorization cards. She characterized the level of discussion about this subject both "on and off the boat" as considerable by mid-August, and that no effort at secrecy was undertaken. Kuntz' testimony on the point shall be referred to in later assessment of her credibility, it sufficing for now that she identified Kimura as one of the two or three individuals "actively pushing" the Union. Also, she managed to testify that she was unaware of his having done anything "to support the Union" as of September 12, on which date she was involved in a certain conversation with Howland, but that she really had seen him render such support up to that point in time. Kimura testified that he had come to the R case hearings along with many other employees, and that he had passed out "pledge cards" in the context of Sommerstedt "never" having been more active in the Union than himself.

General Counsel's case-in-chief was based on the overall testimony of these three individuals, coupled with related documentary evidence. Sommerstedt testified that on September 17 she had conversed with Howland on the *Rella Mae's* main deck, and in the course of this he asked for her referral recommendations on "needed new girls," but not any who were "poisoned" by the Union. The next day had been a date of hearing on the R case petition, and following her attendance thereat Sommerstedt had gone to the home of Kuntz feeling indisposed. While Sommerstedt was there Howland had telephoned Kuntz on another matter, and, sensing it was him, Sommerstedt took the phone to advise she could not appear

for work that evening because of illness.⁵ She testified that Howland's response to this was saying that while "a damn good waitress" Sommerstedt was being "watched very closely . . . because of this union business." When she sought clarification of his remark, he simply emphasized that she should remember who she was working for.

The next significant event described by Sommerstedt occurred on October 10, the day following that on which she had actually testified at the final R case hearing. For that day, a Saturday, she believed her starting time was 4:30 p.m.⁶ Around 11 a.m. Howland telephoned her at home as a reminder that her special training was needed for a private party of honeymooners on the regular sail that night.⁷ Following this Sommerstedt departed with friends for daytime pleasure sailing, and in the course of about 5 hours off the leeward shore she became very seasick. Sommerstedt testified that upon arriving back at the dock around 3:30 p.m. she immediately telephoned the *Rella Mae* to reach Tobin. Her call was answered by Bill Buttery, the ship's mate. She recalled that he summoned Howland to the phone, and upon her explanation of being ill Howland became very angry and told her not to come to work until the following Tuesday, thus skipping a scheduled day.⁸ Howland's version of communicating that afternoon was that Buttery had simply given him a message at 3:40 p.m. of her having called in to say she could not work, and that at approximately 4:20 she called again and told him personally of being seasick. He recalled further that she offered to work a special second sail, one that had been scheduled as a dance cruise but unknown to Sommerstedt having been canceled.

As advised, Sommerstedt went to the *Rella Mae* the afternoon of Tuesday, October 13, but was met by Food Service Manager Brian Agbayani, who seemed surprised

⁵ At that point in time the *Rella Mae* operated two evening sails, departing at approximately 5 p.m. and 9 p.m., respectively. In October this mode of operation was converted to a single evening sail basis, in conjunction with which the *Rella Mae's* licensed capacity was increased to 1,000 persons.

⁶ Employees actually reported to the *Rella Mae* at Honolulu pier 2-C, following which the ship proceeded in an approximate 15-minute time-span to pier 10 where cruise passengers actually embarked. When the sail was over this process was reversed, so that for the last quarter hour employees on board were not in the presence of Windjammer Cruises' customers.

⁷ As to this call Howland testified that it was vital for Sommerstedt to work the special group, and he was relying both on her qualifications to do so and her assurance (which she concededly gave) that she would be there. He added that he told her to be at the ship by 4 p.m. on this particular occasion because of extra setup work involved. Sommerstedt expressly adhered in her own testimony to the belief that her normal starting time of 4:30 p.m. applied that day, as reiterated to her even in this instance by Peggy Tobin, Respondent's food service supervisor for operations on the *Rella Mae*. Tobin's own testimony did not cover the point.

⁸ Sommerstedt believed her coming day off was the intervening Sunday (October 11), while Howland fixed that as a scheduled day of work for her. Howland associated his recollection on the point to the fact that he had given his managers the night off on October 10 because he was going to the Island of Maui the next day as his first break from business since taking on the *Rella Mae* operation, and from which he would not return until the following Monday night in making it a 2-day trip. Howland agreed that he had instructed her to meet him at the boat the following Tuesday.

to see her and said she was on a 10-day suspension.⁹ On the morning of October 14, Sommerstedt and Howland conversed by telephone as the first of what would eventually be at least two separate contacts that day. To her inquiry, Howland said her suspension was occasioned by events of the preceding Saturday. Sommerstedt testified that he said she had "put him in a heck of a bind that night," and that she had disputed his claim of having tried to reach her by telephone throughout the day on Tuesday. She recounted a separate telephone conversation from Howland within the hour in which he arranged to bring papers to her house later in the day. Howland testified that when they first spoke by phone on Wednesday he expressed disbelief as to her having been sick from a sailing trip the previous Saturday, and that a suspension should be expected under the circumstances. Although not mentioning a second telephone call, Howland did describe how he said his "official move" was not one to make over the phone and per agreement he would promptly come to her home in Hawaii Kai.

Howland arrived there by late morning with Agbayani accompanying, and Sommerstedt was first asked to sign a W-4 Form for Respondent. She was then given an "Employee Discipline Action Report" embodying a 7-day suspension effective "until Friday midnite," with a new schedule to be given at that time reflecting a punitive "cut in her current amount of hours." The stated basis for this action was "insufficient notice" of not appearing for work, and the explanation seasickness was termed "unacceptable." Sommerstedt testified that she disagreed with the written notice of suspension, finding many things incorrect about it. Upon inquiring of Howland where to get help on the matter, she recounted that he said her union had gotten her into things and she should talk to her union man in order to get out. Howland generally agreed that Sommerstedt had disputed the notice and refused to acknowledge it with her signature; however, he testified that when she asked about "recourse" he answered only that she might "go to the union."¹⁰ Agbayani essentially corroborated Howland as to happenings when they delivered the suspension notice to Sommerstedt, testifying that Howland "referred her to the union," but that he did not hear additional remarks about the Union's having gotten her into the predicament and could get her out.

On October 22 a precipitating event occurred as to Sommerstedt¹¹. She testified that after disembarkation of passengers from the *Rella Mae's* evening sail, a prankish ice dosing was begun against her and hostess Patty Dias as they were engaged in wrap-up duties on the main

deck. The perpetrators were Windjammer Cruises' employees, one being Chief Engineer Jim Fernandez and the other three being engine room personnel named Jerry, Dan, and Jack. In fast-breaking action the females were pushed toward ice machines, and the males scooped ice down their backs. At this point Agbayani appeared and the episode quieted for a few minutes. Then Fernandez took a firehose and began blasting Sommerstedt with water, causing her to react in laughing dismay by trying to run clear of the soaking. In the process she came near to Tobin, who had reached the scene, and she recalled that this supervisor looked at her and said "maturity." Sommerstedt described the encounter as concluding when she was finally able to sit down at the side of the ship, after having told Fernandez to stop what he was doing. She tended not to believe she had "playful[ly] revenge[d]" herself against Fernandez or the other males by reciprocally putting ice down inside of garments or grabbing a waterhose and spraying back. She termed her mood during the incident as resignedly amused, although emphasizing that the experience "wasn't really all that funny." Sommerstedt stated that she eventually did some cleaning up from the aftermath of things by picking up ice from the carpeted floor and "by clean[ing] up some of the mess." She testified that counting all her time with the *Rella Mae*, as originating with hire by Windjammer Cruises in late May, it was very common for there to be water fights among various people on the boat after passengers had left, often as a matter of throwing it back and forth from pitchers.

The episode was testified to by various witnesses of Respondent. Tobin's first awareness was that she saw a fight in progress upon ascending stairs from the galley, as to which she saw Sommerstedt squirting water and being squirted as people around laughed and screamed in apparent delight. There was sliding in puddles on the carpet and throwing of ice, as Sommerstedt ran around "yelling, screaming [and] totally soaked." Early in Tobin's observation of happenings Sommerstedt ran up to her and passingly yelled "make them stop" as she turned back in reexposure of herself to the fray. Tobin took the opportunity to say "Karen, act mature, leave the area; stop," but the disbelieving reality of things to her was that Sommerstedt simply went right back to what she had just disengaged from. Regarding the implication of certain questions by the General Counsel on cross-examination, Tobin averred that she had not attempted to assert herself in bringing the event to a halt because she had an acute fear of Fernandez based on a confrontation with him the previous week. Tobin stated that she had never seen a water fight taking place on the *Rella Mae* during the 5 weeks Respondent had been food and beverage contractor.

Pantry employee Cynthia Mykytka testified that she had seen the water fight of October 22, in which Fernandez was throwing ice while Sommerstedt was also throwing ice, yelling, and not trying "to escape" from the scene. Hostess Michelle Chun testified that she saw the water fight go on for about 10 minutes, during which Sommerstedt was "shooting" Fernandez with a waterhose, chasing him, throwing ice, running around, laugh-

⁹ Howland testified to facing an "incredible amount of problems" upon reappearing at his Mid-Pacific Institute office, and unsuccessfully attempting to reach Sommerstedt by telephone beginning that Tuesday morning. He added that it had been relayed to him that, in fact, she had appeared at the boat that afternoon as instructed.

¹⁰ In Howland's outline of background he described familiarity with the culinary union in California, that he had previously been a union organizer, and that he majored in industrial relations in college.

¹¹ She had actually returned to work on Tuesday, October 20, on the more limited basis invoked by Howland. Additionally she had, without success, appealed her suspension by telephone to Pedersen, who concluded after acquainting himself with the circumstances that it had been appropriate discipline.

ing, teasing, and giggling. Chun recalled that Sommerstedt both ran away from and returned to the water fight one or two times. Chun denied there had been any water fighting after Respondent took over its operations on that boat. Hostess Katherine Walters testified that she saw parts of the water fight, with a drenched Sommerstedt trying to sneak behind Fernandez to grab the hose away from him and that she had succeeded in turning a hose on other of the mischievous males. Her observation covered 5-10 minutes, and she recalled that even though Fernandez seemed to be trying to gush up her dress Sommerstedt had attempted her return ploy two or three times. As this was transpiring Walters could see Agbayani observing while looking "really mad [and] upset." Pantry employee Lois Castillo testified that she saw the water fight with Sommerstedt running up and down for 10-15 minutes, playfully squirting water with the hose, tugging on it with Fernandez, and disregarding Agbayani's order to the participants about "That's enough, now." Former hostess Sandra Cochran testified that she saw Sommerstedt involved in the water fight for 10-15 minutes, during which participants shot water back and forth in playfully "immature" fashion. She recalled the floor being left unvacuumable from the sogginess and that it seemed to be then dangerously slippery. Agbayani testified that he came upon the water fight in progress, with his first awareness that Fernandez and Sommerstedt were squirting water back and forth as they jostled for control of a hose. In the course of the nearly 15-minute-long episode he had reported it to the captain and first mate on the *Rella Mae's* bridge, and had futilely yelled "stop it" at participants after coming back down to that deck. He also had heard Tobin tell Sommerstedt to get away from the action, in the course of which she used the word "mature," but this was not heeded as the "screaming and yelling" resumed.

Howland had missed the water fight because as was his custom he left the boat around 7:50 p.m. on October 22 as it reached pier 10, and rode with leftover food back to his Mid-Pacific Institute location. From there he went to a nearby restaurant where he was to have a planning meeting with his management staff. Agbayani and Tobin were late for its scheduled 8:45 p.m. start, but when they did arrive each launched immediately into a description of the incredulous seeming aquafray which they characterized as an occurrence that "really got out of hand."¹² Howland testified that the supervisors indignantly pushed for Sommerstedt's termination because of her willing involvement in the "wild and crazy melee," and because she had insubordinately disregarded Tobin's request that things be stopped.

The next morning Howland telephoned Pedersen with Tobin present at the calling end. The whole incident was recounted to Pedersen, who first solicited the two available opinions which recommended termination. He then decided while the telephone conversation was still underway to take such action, based largely on Sommerstedt's having just actively resumed work following suspension.

Pedersen's stated reasons for such a decision were that the behavior represented intolerable horseplay and violation of safety practices. He categorically denied imposing the action because of any union activities that Sommerstedt may have been carrying out.¹³ A written termination notice of predictable content was prepared by Howland, and delivered to Sommerstedt that afternoon by Tobin. Sommerstedt testified that, in connection with receiving this notice and her final pay, Tobin had said, "We've been waiting for you to pull something like this and now you've given us cause to fire you . . . This is the straw that broke the camel's back." Tobin denied that such was said during what she termed a "very short" conversation.

A second branch of this case concerns the allegation that Kimura was denied employment when Respondent absorbed most other employees because of his activities on behalf of the Union. Context for such allegation is provided by the testimony of Kuntz, who recalled a conversation with Howland on September 12 in the purser's office at which time she was told it would be her last night because she had "too much power over the employees" which would, in Howland's view, impede the "smooth changeover" that he envisioned. Kuntz testified that Howland remarked how Windjammer Cruises' owner, Halcro, had revealed to him that Kuntz was "part of the main source trying to bring in a union, to unionize the boat," adding that all the people except she and Kimura would be kept on because of a feeling that "me and Bart were the main problems with the union." Kuntz added that Howland had said that she could even tell this to Kimura. When the conversation ended she promptly went upstairs and did tell Kimura what had been said about them.

Kimura testified that Kuntz had originally interested him in the Union, for which he passed out the "pledge cards." He recalled September 12 as the date on which Kuntz had weepingly told him of Howland's saying that neither of them would be hired by Respondent "because of the union." Kimura testified that later that evening he asked Howland directly "why weren't we being hired," and heard the Union stated as the reason because this constituted "a threat to them." Kimura made no response to this, recalling only that he just walked away. Kimura also testified that he had sought to transfer with Respondent by placing a job application in the drawer of the purser's desk during early September. Around September 10 Howland had spoken to him asking whether he would be applying, and Kimura answered that he had turned the necessary document in to Kuntz. Kimura recalled that the question was repeated to him by Howland around September 14, at which time he made no answer because by then he had become reconciled to not really being hired anyway by Respondent based on what Kuntz had told him of Howland's intentions, coupled with his own discussion with Howland on or about September 12.

¹² As indicated with rulings made at the time of hearing no weight has been given to Howland's quoted impression of what he was so told, nor in other regards to hearsay testimony of matters not within a witness' personal knowledge.

¹³ Similar denials were expressly made by Tobin and Agbayani. In the latter's case, there was some inadvertent misspeaking to a question at the hearing I take this to be misunderstanding of the question, and am satisfied that it was credibly cured by Agbayani's response when the pertinent question was repeated to him.

Howland's testimony on this issue is that he was unaware of Kimura's being active for the Union, but had heard from numerous people that he was an exceptionally fast and cooperative bartender. He had spoken with Kimura about getting an application to Respondent, as he had done with many other individuals who did not move with alacrity toward the prospect of new, continued employment on the *Rella Mae*. Howland recalled a conversation with Kuntz on September 12 in a ship's office in which he informed her that his observations in riding the boat had led to a belief that employees would be "resist[ant]" toward him with her still present. He testified to informing Kuntz that for this reason she would not be hired by Respondent, but he flatly denied any remarks to the effect that she or Kimura were a "main problem" or were "instigator[s]" relative to the Union. Howland added that to the contrary Kuntz had even once brought out in a group discussion that Kimura did not intend remaining with the rest. Howland denied any discussion with Kimura on September 12, and particularly that he had ever described him as a "labor agitator." What Howland did recall was that on Monday, September 14, he had asked Kimura a final time whether he was interested in continued employment, and heard Kimura answer that he would instead affiliate with Iva Kinimaka, the *Rella Mae's* former musical entertainer for whom Kimura had periodically performed impromptu lighting services during performances when bartending duties were slack or complete.¹⁴ Howland denied that Kimura's application was among the 38 or 39 he received, or that such was among the several out of this total given to him directly by Kuntz. Howland's express reason for not hiring Kimura was simply that he never turned in an application.

Evidence tending to buttress the General Counsel's theory of unlawfully motivated personnel decisions, and further to specifically support allegations in subparagraph 6(c) of the complaint, was offered by Sommerstedt.¹⁵ She testified that on an occasion in late September, while at the stern of the *Rella Mae's* second deck, Howland had responded to her remark about employees being upset with the many confusing changes suddenly imposed by saying that he "hate[d] all of you girls because of this union business [by which] you're trying to negate my contract and put me out of a job." Sommerstedt made no reply at the time but later that evening Howland abruptly spoke to her again, after she had inquired about his seeming distress, by saying she could check into other job offers because of "rub[bing] [him] the wrong way."

With much turning on claimed verbalisms, the treatment of factual issues in this case requires an early assessment of credibility. I am dubious about the veracity of the General Counsel's several witnesses, and discredit each of them in salient regard on various grounds. Som-

merstedt appeared determined to slant her employment experiences, and to transmogrify her objectives as an early advocate of the Union into some form that would assist such purposes. As a matter of demeanor she projected quite emphatically with the evasive, artificial, shifting manner of one obsessed with self-interest and not a concern for truth.¹⁶ Her quippy style of response, and seeming disassociation from the realities of life, amply adds to the rejection of what would otherwise be significant evidence. This latter point is best illustrated by events of October 10. While admittedly susceptible to seasickness and knowing at least that her services were being relied upon for a "private party"¹⁷ on the early sail, she nevertheless spent practically all the intervening time between late morning and mid-afternoon on a small boat reaching unsheltered waters "past Diamond Head," and from which, as predictably so, she soon became ill and unavailable to her employer. Notably she offered to work a second sail in the context of her thought that by "lay[ing] down for a while [she would] usually feel a lot better." The rather obvious conclusion to draw from this caper is that Sommerstedt viewed her employment as a sort of optional pastime, and I am totally convinced that the same sort of dilettante thought processes caused her to retain fact, fiction, and fantasy in a jumbled potpourri of memory that is next to useless for probative input to the case beyond mere chronological recitations.¹⁸

Kuntz was similarly of unpersuasive demeanor, tending to shift her answers and her emphasis for institutional or retributive purposes. Overall probabilities of the situation also militate against Kuntz' testimony, particularly in attributing bald antiunion remarks to Howland whose background is one of both practical and academic exposure to the collective-bargaining process and dynamics thereof. I am less skeptical of Kuntz in general comparison to Sommerstedt, and in this regard have closely scrutinized her testimony of having given Kimura's job application, along with others, to Howland on or about September 10. While there is assurance to her description of this moment, I note that she was "not quite sure" of persons actually represented. For this and collateral reasons dealing with further overall probabilities, and with Howland's own credibility, I conclude that Kuntz was mistaken in believing she transmitted Kimura's application. Kimura's own testimony was woefully unpersuasive. His demeanor showed a rigid, withdrawn capacity for the ordinary, interpersonal dealings attendant on changed employment circumstance, and his explanation of why he remained silent in the face of Howland's last-minute request for a job application from him is incredible at best and bizarre at worst. Further, Kimura's testimony of

¹⁴ Her testimony of Howland's having termed a desire for referral of prospective employees only in terms of those not "poisoned" by the Union is oddly absent from an investigatory affidavit given by Sommerstedt on October 29.

¹⁷ This term signified elaborate treatment of honeymooners with dinner amenities of elegance and seclusion requiring far more intricate hosting than for regular cruise passengers.

¹⁸ In view of credited evidence concerning the water fight of October 22, it is also apparent in this same regard that Sommerstedt's version thereof displays the same shallow awareness of her own behavior and its relationship to prudent necessities of a structured setting such as the *Rella Mae* cruise operation.

¹⁴ Kimura had testified to exploring work prospects with Iva as early as September 13, and actually working for the featurist on a brief, sporadic basis in mid to late September. Kimura ultimately accepted a job with Nephi Hanneman, a well-known Hawaiian musical entertainer, and on this basis returned to the *Rella Mae* for a period of time beginning in December.

¹⁵ Assertions in her testimony as previously recited above related to complaint subpars. 6(a) and (b).

even being active for the Union through the passing of authorization cards is contradicted by Sommerstedt, and while corroborated by Kuntz the entire configuration of testimony casts overall attempted proofs of the General Counsel into further disarray.

In contrast, Respondent's witnesses were generally impressive, persuasive and truthful seeming, the most notable of these being Howland. He described confrontational or conversational nuances with great care, and admitted to just those remarks, emotions, and evaluations as would have been expected under the various circumstances. His demeanor was superbly convincing, and on these several bases I credit his overall rendition of facts and his various pertinent denials of what he was claimed to have said.¹⁹ Tobin is another witness of highly impressive demeanor, and I am satisfied she has accurately reconstructed the essence of what she saw during the water fight to October 22 and its relationship to Respondent's obligation as an onboard contractor. Pedersen, while flustered somewhat during cross-examination on the matter of disciplinary policy, is credited insofar as he had a secondary role in events of the case, and was at least free of being influenced by any union activities afoot during the critical September-October period. Mykytko, Walters,²⁰ Castillo, and Cochran are all readily credited on demeanor grounds respecting what they observed as to Sommerstedt's participation in the water fight, while Chun is partially credited as to that point also, for her testimony was shaky in spots.²¹ Agbayani is credited concerning his observations on October 22 and his spontaneous reaction thereto (noting the misunderstood question referred to above), while I also credit his

testimony to the effect that on October 14 at Sommerstedt's townhouse Howland made only the limited remark about the Union that he himself recounted.

In consequence of this shakeout of testimony what eventuates is a routine showing that from business contact many months earlier Respondent acceded to a tricky, new venture just as its seasonal crunch was being reached. Full responsibility was thrust onto Howland, and he proceeded with orientation, staffing, and general planning under an aura of urgency. The undertaking was only for an initial 4-month period, and in keeping with its experimental nature all employees hired over were on a probationary basis. The existing proceedings underway with the Union's representation petition allowed official involvement of Respondent by way of legalistic amendment relating to parties, but leads to no demonstration that Respondent was hostile toward the Union or its adherents. In fact, the evidence showed that seemingly resounding support existed among the affected employees, and this alone dilutes any assertion that Respondent had insidious reason to single out certain persons for discrimination.

Chronologically the first issue to adjudicate concerns Kimura's not having been hired. I conclude that it was plainly, purely, and simply because he did not apply or even evince an interest in employment with Respondent. He was known as drifting into the entertainment phase of local tourism, while others, Kuntz herself (who went with a smaller ship *Invader*) and two of the five individuals formerly with Royal Banquet, were not assumed. In these latter cases the suggestion reached Howland that the two former Royal Banquet employees were inclined to work elsewhere, and consistent with this he did not receive an application from either of them. As already noted it is ambiguous whether Kimura had any greater stature as a supporter of the Union than "98 percent" of all Windjammer Cruises' employees, and in the absence of generalized or specific evidence of employer animus there is nothing to say about his case beyond that he might have tended bar for Respondent had communications been less thwarted by pride or paranoia.

My credibility resolutions leave paragraph 6 of the complaint, and all its subparagraphs, unsupported by probative evidence. There are thus no independent 8(a)(1) violations from which to view the suspension and later discharge of Sommerstedt, and other cryptic verbalisms to which she testified are found not to have actually occurred.²² Other remarks admittedly were made, including Howland's rather direct statement that Sommerstedt seek other work if she did not like Respondent's tight-

¹⁹ What the record does not show clearly is that a major portion of Howland's cross-examination was of pressing, rapid-fire style which at times manifested sarcasm and argumentativeness. Howland's fielding of all such questions ranging over practically all aspects of the fact situation was impressively consistent, believable, and precise, as in the latter instance when he refined an answer in terms of best remembering that on September 14 he had not merely asked if Kimura was "coming with us," but that he synonymously inquired of Kimura if he were "going to give me an application." In fairness, it must also be pointed out that at Respondent's counsel's first opportunity he voiced a throwaway question which parodied certain thrusts of the cross-examination. This observation is only to illustrate the spirited nature of advocacy that surfaced during this hearing, but leaves the essential credibility resolution as one highly favorable to Respondent's key witness. The denials of Howland which I specifically credit are those of not saying on September 17 that he wanted "[un]poisoned" applicant referrals, of not saying that his verbal caution to Sommerstedt on September 18 associated to any involvement with the Union, of not saying in late September that his "hat[red]" for the girls associated in any way to the Union, of not telling Sommerstedt on October 14 that the Union had gotten her "into this" (disciplinary action), and of not telling Kuntz (or Kimura himself) that Kimura would be shunned for employment because he was thought of as an "instigator" for the Union (thus vitiating complaint subpar. 6(d), the only independent 8(a)(1) allegation not already expressly commented upon).

²⁰ Walters was shown to have disdain for the Union, and because of this factor I have carefully considered the style and substance of her testimony. Upon such reflection and recall of her demeanor as a witness, I repose major weight to her testimony which was forthright impressive and consistent. Notably, too, Walters named Dias as an individual "very strong[ly]" for the Union based on numerous displeasures with the job.

²¹ Chun was marginally persuasive, yet on demeanor grounds is credited to a further extent with respect to her testimony that Kimura was only of "average" level participation in union activities, that her own were more pronounced than his, and that she had seen no water fighting other than on October 22 after Respondent took over functions formerly carried out by Windjammer Cruises employees.

²² In this I expressly credit Howland's version of a conversation on October 14, corroborated as it is by Agbayani, to the effect that when Sommerstedt importuned him for suggestions concerning her suspension from work he remarked merely that she contact the Union where presumably knowledgeable advisors could assist her. This statement harmonizes with ordinary conversational flow under the circumstances, and is devoid of any significance tending to show unlawful motivation towards Sommerstedt in her capacity as an employee. I also expressly credit Tobin as to her testimony of not saying to Sommerstedt when terminating her that Respondent had gotten its chance from her "screw up."

ened operation controls,²³ that on her first instance of reporting sick she was reminded that a probationary period was running as to which she was being "watched closely," that she would have to accept notions dear to Halcro as owner of the boat or she would "have to leave," that he did once unleash the remark of "hat[ing]" all the girls,²⁴ and that he had in late September accused Sommerstedt of "rubbing [him] the wrong way." All such expressions are similarly predictable in the clash of wills represented by Sommerstedt and Howland interrelating to the extent that had been necessary, and do not carry an implication that may rationally be associated to impermissible hostility toward union activities then underway.

Essentially General Counsel has made no *prima facie* case. However, to the extent it might be contended that timing of the challenged actions, prominence of Sommerstedt in the Union's organizational campaign, an appearance of disparate treatment respecting Sommerstedt, internally shifting or inconsistent reasons for discipline against Sommerstedt as perceived among the management hierarchy, awkward testimony given on those same points by Respondent's witnesses in the course of hearing, failure to show that Sommerstedt was under prior notice of prohibited conduct, inconsistency in application of disciplinary policy, and condonation of peccadilloes among employees comparable to Sommerstedt's involvement in the precipitating water fight, all combine to invite an inference of discriminatory motivation, I expressly treat these matters.²⁵

The factor of timing is inconsequential in this case for Respondent had been the legal employer less than 6 weeks during which all the operative events occurred. Given that Sommerstedt's first 3-1/2 weeks were uneventful, the compressed actions of October 10-22 were dictated by her own initiating behavior, and not in rela-

tion to the R case processing that had peaked by closing of formal hearing stage on October 9. Her involvement with the Union, while early on and consistent, lacked the stridency that would suggest a reason to single her out, nor is there credible evidence tending to show that any of Respondent's agents harbored such a desire. Howland admitted to knowing at least that Sommerstedt was pushing the Union with a "fervor" equal to most others, and made the point that harmonious with other evidence of the case Kuntz was as much a leader as the cause had. Notably, Howland actually offered Kuntz a position on the *Rella Mae*, conditioned on a 10-day hiatus during which he could consolidate his own authority as the new manager of certain operations. Patty Dias received a 1-week suspension for her own participation in the water fight, and Respondent has effectively explained that this more restrained action resulted from there being no prior infractions in Dias' record.²⁶

It is true that Respondent has not advanced a tidy explanation of just why Sommerstedt was suspended and later terminated. I am satisfied, however, that from Howland's testimony the necessary and validating explanation is found. Pedersen strove to show that he had a manifest role in the happenings, yet it is more acceptable to believe that this represents executive syndrome and not true recollection of the penetrating realities faced by Howland and his handling of them when occurring. It is plain, and Sommerstedt so much as admitted, that her afternoon illness of October 10 was practically self-induced in a way that would be infuriatingly adverse to Howland's urgent need for her services, for which he had specifically conveyed a reminder to her scant hours before. Further, his statement of fully doubting her story of being seasick is perfectly consistent with what he then knew of her nature, her propensities, and her preferences. Her nature was energetic, her propensities were opportunistic, and her preferences were for the more jolly sort of sailing that a dance cruise would offer over a work shift of slavishly attentive service to honey-

²³ Howland summarized this new approach rather vividly in lexicon of trendily aware persons, contrasting the tautness of such a ship with what had prevailed before. It was put so:

We were going to run a heads-up ball club. We were just going to be efficient, little more efficient than what I'd seen. We're going to quit chatting while we're on the job, gonna stay away from extended breaks, to be professional, things like we're not going to smoke on the floor in front of the customers, that kind of thing. We're going to run it like we'd been in business for 20, 30 years. We were just going to do it right.

* * *

The problem was there's very little management evident on the boat up to that time. Problem was a lot of—there was self-appointed managers, that people had natural leadership ability took over, ran things, directed things, without necessarily stepping on anyone's toes, from what I could see. They ran things and there were very strong friendships formed. It was just "Hey, we got—" They did run it. But there was a total lack of management, from what I could see.

²⁴ Howland credibly described that this expression was provoked by "digging" at him as former Windjammer Cruises' employees resisted his authority, and seemingly wished Respondent would "just dry up and blow away."

²⁵ In its brief the Charging Party requests a specific finding in consonance with the Board's "motivating factor" rule as recently established in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980). I find it unnecessary to do so as I am plainly deciding that the requisite *prima facie* showing has not occurred, and in any event the assigned reasons for termination were not tainted or pretextually based. Cf. *Limestone Apparel Corp.*, 255 NLRB 722 (1981).

²⁶ In his brief the General Counsel argued that Respondent presented no evidence of schedule changes that constructively converted Sommerstedt's 7-day suspension to a 10-calendar-day period without work. The point is actually inconsequential, and clearly Howland had determined to further delay her return to active duty when the literal 7-day period would have expired on Saturday, October 17. As known, she did resume her shift on Tuesday, October 20. Additionally, the General Counsel posits some significance to a lack of evidence from Respondent concerning other employees who might have called in late and not been given warnings similar to Sommerstedt's. I note this rather oblique contention, but believe that it would be foreign to proceedings of this type to expect an employer to reconstruct some minor past irritant and particular reactions thereto of a particular supervisor at the particular time. The brief is also used as a vehicle to attempt amendment of the complaint by conditionally alleging further independent 8(a)(1) and (3) violations of the Act based on the verbalisms attributed to Howland by Sommerstedt on September 18 and on or about September 28. I actually find the facts to be otherwise, but beyond that such matters would not amount to fully litigated issues as a matter of law, nor were they even "warnings" associated to any formal or informal progressive discipline system. Contrary to the General Counsel's interpretation of Howland's testimony he did not so denominate them, but merely emphasized in exasperation as cross-examination repeatedly traversed the obvious that he had articulated to Sommerstedt on the respective occasions how reliability of her attendance would be scrutinized, and that managerial decisions respecting how to serve the cruising tourists would preempt petty dismays of employee adjustment.

mooners. Howland perceived Sommerstedt to be "cheerful," "up-front," "upset[ting]," "tantrum inducing," and best avoided by professional aloofness to not exacerbate the condition of no "love lost" between the two. In this context his testimony of having suspended Sommerstedt because she did not timely appear for work is normal, natural, and persuasive, and I find nothing suspect about the fact that its memorialization in the document advanced as General Counsel's Exhibit 2 did not recite how management doubted her claim of illness.

Respondent maintains written employee safety instructions, which include the forbidding of "horseplay." Additionally, its formal policy on corrective action procedures sets out a four-step system comprising verbal warning for a first offense, written warning for a second, 30 calendar days' suspension for a third, and separation for a fourth. The policy specifies that any string of offenses "need not be related," and that certain infractions are cause for immediate separation. This list includes "[w]illful participation in unsafe work habits and actions," and a notation indicates the particularly described infractions are "not all-inclusive" because an employee could be discharged for still other reasons. A plethora of credible testimony established that Sommerstedt did, in fact, carouse animatedly for at least 10 minutes once the ice and water were introduced on to her by male mischief-makers, and she did so in goofy defiance of Tobin's baleful order to stop. This was the picture relayed to Howland, and he was the chief translator of things to Pedersen, who reserved to himself final authority over matters such as this imminent discharge. The fact that written policy was not followed, that Sommerstedt is not shown to have actually received the Employer's safety rules, or that Pedersen had difficulty explaining the respective weight which safety concerns and intolerance for employee horseplay had on his mind is not sufficient to overcome the countervailing evidence of Howland's having determined to urge her discharge for insubordinate frolicking that was detrimental to both logistics and image. Her past record was clearly and influentially on his mind, and the composite caused him to conclude that she had such insufficient interest in her job that she recklessly broke the already tenuous bond. Respondent's written disciplinary policy is looked to by Howland only for "guidance," and such aberration within a business organization does not, without more, amount to significant evidence of employer discrimination. Similarly, it is true that other misbehaviors, including alcohol or marijuana

usage, may have occurred during working hours, but the provocative circumstances of Sommerstedt's conduct is enough from which to believe that Howland acted within lawful bounds.²⁷

It remains a fact that the employment relationship is terminable at will, and absent contractual or statutory constraints this often leads to an abrupt and contentious dispute when presumably ongoing job holding is suddenly discontinued.²⁸ Sommerstedt accused Howland of having been a "rotten" manager with personality to match, and this can only serve to comprehend why any greater tolerance was not extended to her. Accordingly, I render a conclusion of law that Respondent has not violated the Act in any regard as alleged, and issue the following recommended:

ORDER²⁹

The complaint is dismissed in its entirety.

²⁷ Tobin had a separate opinion in which she found more elaborate basis to terminate Sommerstedt because of insubordination, creation of a safety hazard, destruction of property, fighting with others while in paid status, and engaging in horseplay. Such separate perception reflects only the greater impact of having dismayedly watched the October 22 episode; however, I do note at this point that Respondent's claim of how the water fight detrimentally saturated carpeting is only partially convincing when it is seen that other sources of water damage frequently arose. On the other hand, Tobin is highly convincing in her testimony that she had never before experienced employees water fighting while aboard the *Rella Mae*, nor had she even known such to have occurred subsequent to September 14. This is the picture minimally corroborated by Chun, and I expressly find that Respondent, by any of its management personnel, had never previously faced the circumstance which materialized before Tobin and Agbayani on October 22. Finally, I note that two other employees had been fired from the *Rella Mae*, but upon the showing of this being for stealing I consider the cases fully distinguishable from Sommerstedt's and give no weight to this aspect.

²⁸ The point is treated during delivery of the court's oral opinion in *Kennard v. United Parcel Service*, 110 LRRM 2434, 2436 (D.C. Mich. 1981), in which United States District Judge Ralph B. Guy alluded to the "starting benchmark" that an employee "at will . . . could be discharged without any grounds whatsoever" and that it is important to keep this "focus" in mind as a "starting point" to "understandable" consideration of the subject on which it is otherwise "very easy to be misled."

²⁹ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.